No. 80-1361

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

M/G TRANSPORT SERVICES, INC.
Petitioner

v.

CITIZENS FIDELITY BANK AND TRUST COMPANY, Executor Under the Will of Thomas L. Shanesy, MARY ELLEN SHANESY, CATHERINE ANN SHANESY and JAMES W. SHANESY

RAYMOND E. POTTER, SR., Administrator of the Estate of Martha Jo Kinser
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner appealed from the trial court's order docketing Respondents' claims for jury trial and providing that any recovery would be enjoined pending trial to the Court of Petitioner's statutory claim for exoneration from or limitation of liability.

1. Was the trial court's order docketing for jury trial an "interlocutory decree ... determining the rights and liabilities of the parties" which would be appealable under 28 U.S.C. §1292(a)(3)?

Respondents state that it was not. The United States Court of Appeals for the Sixth Circuit agreed. There is no conflict among the federal courts of appeal. Petitioners now also appear to agree.

2. Was the trial court's order docketing for jury trial an order providing for the orderly administration of judicial proceedings not tantamount to an order "modifying, refusing or dissolving" injunctive relief within the meaning of 28 U.S.C. §1292(a)(1)?

Respondents maintain that it was. The United States Court of Appeals for the Sixth Circuit agreed. There is no conflict among the federal courts of appeal.

PARTIES BELOW

In addition to those parties identified by Petitioner and aligned with Citizens Fidelty Bank and Trust Company, Executor under the Will of Thomas L. Shanesy, Respondents herein and parties below were Mary Ellen Shanesy, widow of Thomas L. Shanesy, Catherine Ann Shanesy, daughter of Thomas L. Shanesy and James W. Shanesy, son of Thomas L. Shanesy.

The balance of the statements made by Petitioner, M/G Transport Services, Inc. ("M/G") is accepted.

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COUNTERSTATEMENT OF THE CASE

M/G's statement of the case is accepted for purposes of this Brief in Opposition.

SUMMARY OF ARGUMENT

M/G apparently makes no attempt to argue a right to appeal under 28 U.S.C. §1292(a)(3). Its attempted appeal was from the order entered in its admiralty action and was based solely on 28 U.S.C. §1292(a)(1). To prevail M/G must show that the order docketing for jury trial was tantamount to an order "modifying, refusing or dissolving" injunctive relief.

The opinions of this Court and of all the federal courts of appeal are in accord: such orders in admiralty actions are not appealable. M/G has not been denied any of the relief sought in its complaint so that appeal would not lie in any event.

Argument

1. The Trial Court's Order Docketing For Jury Trial Was Not Appealable Under 28 U.S.C. §1292(a)(3).

While it is not completely clear from the Petition, M/G apparently rests its right to appeal exclusively upon 28 U.S.C. §1292(a)(1). Petition for Writ of Certiorari, pp. 5-6. M/G recognizes that the historical application of 28 U.S.C. §1292(a)(3) has been to allow only the appeal of a final determination of liability before the determination of damages in a bifurcated proceeding. Petition for Writ of Certiorari, p. 9. This view is correct. *United States v. The Lake George,* 224 F.2d 117 (3rd Cir. 1955), *The Maria,* 67 F.2d 571 (2nd Cir. 1933).[1]

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[1] While the applicability of 28 U.S.C. §1292(a)(3) has been expanded to include situations other than the final determination of liability in a bifurcated trial, it is still properly invoked only when the merits of the matter have been addressed so as to determine the "rights and liabilities" of the parties, 28 U.S.C. §1292(a)(3), 9 *Moore's Federal Practice,* ¶110.19[3], pp. 210-213.

As previously held by the Sixth Circuit in *Emerick v. Lambert,* 187 F.2d 786 (6th Cir. 1951), as resolved against M/G in this proceeding and as apparently admitted by M/G in its Petition, the subject order of the trial court is not appealable under 28 U.S.C. §1292(a)(3).

2. M/G's Statutory Rights Under The Limitation Act Have Been Fully Protected.

Prior to filing its Complaint for exoneration from or limitation of liability, M/G was faced with wrongful death claims under the general maritime law by the estates and dependants of Shanesy and Kinser, in which actions jury trials had been demanded, *cf., Moragne v. States Marine Lines,* 398 U.S. 375 (1970). Upon filing its Complaint for exoneration from or limitation of liability, M/G obtained an ex parte temporary restraining order prohibiting the filing or further prosecution of claims against M/G.[2]

The present issue centers around Respondents' demand for a jury trial on the common law wrongful death claims and M/G's demand for a prior trial to the court on its petition for exoneration from or limitation of liability. On Shanesy's motion all three actions had been consolidated for purposes of discovery; entries in one action were effective as entries in the other two actions.

In order to bring these cases to a conclusion, the trial court placed the Shanesy and Kinser claims on the jury trial docket by the following order and upon the indicated condition:

> M/G argues that its petition for limitation or exoneration must be tried to the Court before plaintiffs may have their common law actions tried to a jury. The Court is not persuaded that such a procedure is in the best interest of judicial economy. Should the jury absolve M/G from any liability for the tragedy, M/G's petition is moot. *On the other hand, should the jury assess all or part of the liability against M/G, an injunction will issue enjoining plaintiffs, or any of them, from enforcing any judgment entered on the jury verdict until M/G's petition for exoneration is tried to the Court* (emphasis added).

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[2] It is interesting to note that no request has ever been made for the entry of a temporary or permanent injunction of similar tenor. The temporary restraining order was entered on September 11, 1978, was effective for ten days only and has never been extended. F.R.Civ.P. 65(b).

> Memorandum and Order, entered July 7, 1980; Appendix, Petition for Writ of Certiorari, pp. 36-37.
>
> And, in an Order of the same date:
>
> > It is Ordered that these cases be set for Trial before a Jury on the issues of liability and damages, on December 1, 1980, at the hour of 9:30 A.M. The case will then be tried on the issue of limitation, if necessary.
> >
> > Order, entered July 7, 1980; Appendix, Petition for Writ of Certiorari, p. 39.

The procedure utilized by the district court was in conformance with this Court's opinion in *Lake Tankers v. Henn,* 354 U.S. 147 (1957). The attempted appeal ensued [the trial date now is June 9, 1981].

Perhaps it is felicitous that all three proceedings are within the pre- and post-trial management powers of one federal judge. Felicity or not, the fact remains that all of the relief afforded M/G under the Limitation of Liability Act is still available to it. The trial court has done nothing other than determine the sequence in which the actions before it shall proceed; M/G has been exposed to no additional liability or risk of liability nor has it been denied any statutory right to which it is entitled.

3. The Subject Order Is Not Appealable Under 28 U.S.C. §1292(a)(1).

Appeals of interlocutory orders granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions are allowed under 28 U.S.C. §1292(a)(1). An appeal as of right would exist in the present matter only if the District Court modified an "injunction" or if the admiralty/civil practice historical distinction is such as to allow the appeal.

In admiralty proceedings, 12 U.S.C. §1292(a)(1) is more narrowly interpreted than in ordinary civil actions. In ordinary civil actions a doctrine familiarly termed the *Enelow-Ettelson* rule[3] allows for the appeal of orders granting or denying jury

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[3] *Enelow v. New York Life Insurance Company,* 293 U.S. 379 (1935), *Ettelson v. Metropolitan Life Insurance Company,* 317 U.S. 188 (1942).

trial even though such orders are not couched as true injunctions. Admiralty actions, however, have been spared the application of this much critized and troublesome rule.

As stated in 9 *Moore's Federal Practice,* ¶110.19 [3] at pp. 215-216:

> But while orders respecting true injunctions in limitation proceedings in admiralty are appealable under 28 U.S.C. §1292(a)(1), it is clear that the troublesome Enelow-Ettelson rule is not applicable to admiralty cases ... the Enelow-Ettelson rule permits appeals under §1292(a)(1) from orders that do nothing more than determine how the action is to proceed.

And in *Penoro v. Rederi A/B Disa,* 376 F.2d 125, 129 (2nd Cir. 1967), *cert. den.* 389 U.S. 852 (1967) wherein the court states:

> Orders by courts in admiralty granting or denying stays of proceedings before them have been spared the confusion of Enelow-Ettelson-Morgantown-Baltimore Contractors. Such orders have consistently been held not to be injunctions within the meaning of §1292(a)(1).[4]

The foregoing comments and decision are based upon the authority of *Schoenamsgruber v. Hamburg American Line,* 294 U.S. 454 (1935).

Absent the *Enelow-Ettelson* rule, which does not apply in an admiralty case, the district court has the inherent power to set the sequence of proceedings pending before it to await the disposition of other related actions in the same court. *United States v. Chelsea Towers, Inc.,* 404 F.2d 329 (3rd Cir. 1968). Such orders are:

> "...incidental to the power inherent in every court to control the disposition of the causes on its

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[4] Accord: *W. R. Grace & Company v. Trawler Crustamar,* 571 F.2d 318 (5th Cir. 1978); *Tradax Limited v. M.V. Holendrecht,* 550 F.2d 1337 (2nd Cir. 1977).

> docket with economy of time and effort for itself, for counsel, and for litigants. How this can be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. North American Company.*, 299 U.S. 248, 254-255 (1936).

As stated in 9 *Moore's Federal Practice,* ¶110.20 [4.-2], p. 250:

> An order granting or denying such a stay is not ordinarily regarded as the grant or denial of an injunction. This is so whether the prior action is pending in a state court, another federal court, or in the same federal court. The stay is an ordinary interlocutory order. As such, it is potentially reviewable under 28 U.S.C. §1292(b), and mandamus will lie to correct an abuse of discretion. But it is not reviewable as of right under 28 U.S.C. §1292(a)(1).

The subject orders of the Trial Court are not appealable under 28 U.S.C. §1292(a)(1).

CONCLUSION

There is no conflict between the circuits nor is there any serious or important issue presented. Petitioner's statutory right to limitation has not been effected by the district court's order. No injunction has been modified, dissolved or refused within the meaning of 28 U.S.C. §1292(a)(1), the only basis upon which Petitioner sought review. All that is involved here is a trial court order setting forth the sequence in which two cases will be tried.

Respondents, Citizens Fidelity Bank and Trust Company Executor under the Will of Thomas L. Shanesy, Mary Ellen Shanesy, Catherine Ann Shanesy and James W. Shanesy, respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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